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No. 98-105

In The

Supreme Court of the United States

October Term, 1998

MIRTHA URBANO,

Petitioner,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBIN E. CURTIS
Counsel of Record
MARGARET COULLARD PHILLIPS
CONTINENTAL AIRLINES, INC.
Attorneys for Respondent
2929 Allen Parkway
Suite 1466
Houston, Texas 77019
(713) 834-5119

149164

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

a. Whether the District Court and the Fifth Circuit correctly ruled that, pursuant to this Court's *McDonald Douglas/Burdine* burden-shifting analysis for Title VII and PDA cases, Urbano could not and did not make out a *prima facie* case of "disparate treatment" pregnancy discrimination because, under Continental's workers' compensation transitional duty policy, pregnant employees are treated identically to other employees who are not injured on the job.

b. Whether the District Court and the Fifth Circuit correctly ruled that Urbano did not make out a *prima facie* case of "disparate impact" discrimination because she provided no evidence that the transitional duty policy's exclusion of those unable to work for non-work-related reasons fell more harshly on pregnant employees than on others with non-work-related medical restrictions and because Urbano provided no evidence that the transitional duty policy had a causal connection to a class-based imbalance in the workforce.

c. Whether the District Court and the Fifth Circuit correctly ruled that there was insufficient evidence of the causal connection necessary to prove retaliation under the PDA when the unrebutted summary judgment evidence showed that the pregnant manager responsible for sending the form termination letter when Urbano did not contact her supervisor at the expiration of her Family/Medical leave did not have knowledge of the protected activity, *i.e.*, Petitioner's filing of an EEOC charge.

STATEMENT PURSUANT TO RULE 29.6

The Respondent Continental Airlines, Inc. Continental Airlines, Inc. has no parent corporation. Its nonwholly owned subsidiaries, whether direct or indirect are:

1. Amadeus Global Travel Distribution, S.A.

2. Calair L.C.C.

3. Caljet LCC

4. Expressprop LCC

5. Vaisan Partners Limited Partnership

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner Mirtha Urbano ("Urbano") sued her employer, Continental Airlines, Inc., ("Continental") claiming that Continental's workers compensation policy to provide transitional duty (sometimes referred to as light duty assignments) only to assist employees who have been injured on the job in decreasing their dependence on workers compensation payments by returning to work in a light-duty capacity, discriminated against her on the basis of her pregnancy in violation of the Pregnancy Discrimination Act ("PDA"). Petitioner claimed this policy constituted pregnancy discrimination under both disparate treatment and disparate impact models. Urbano also claimed that the form termination letter she received when she did not contact her supervisor at the expiration of her Family/Medical leave was an act of retaliation for filing a charge with the EEOC. Although she admitted she received 90 days of Family/Medical leave[1], Urbano claimed the form termination letter was also an act of retaliation under the Family and Medical Leave Act ("FMLA")[2]. Finally, Urbano made a state law claim for intentional infliction of emotional distress.

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1. Contrary to Petitioner's statement in support of her FMLA claim that Urbano was still on this "leave" at the time she received the form termination letter (Petition, at 6), Urbano testified she received all 90 days of her Family/Medical leave which expired on February 6, 1995, as correctly stated in the form termination letter. (R. 207A, 206). Continental provides more than the 12 weeks of leave required by the FMLA.

2. Because the Questions Presented in Urbano's Petition do not mention or refer to her claims under the FMLA, Continental assumes and submits that Urbano has waived any claims under the Family and Medical Leave Act.

The District Court granted Continental's motion for summary judgment as to all claims, and Urbano appealed to the Fifth Circuit on all claims except her state law claim for intentional infliction of emotional distress. "Because the PDA protects pregnant women only from being treated differently than similarly-situated non-pregnant employees . . . and does not guarantee light duty assignments" and because the District Court correctly granted summary judgment on all claims, the Fifth Circuit affirmed. (Fifth Circuit opinion, Petitioner's App., at 1a, 2a, n.1).

B. Statement of Facts

Because Petitioner's Statement of the Case contains numerous misstatements and omissions of fact, Continental draws the following from the record facts.

This case arises out of Continental's workers compensation policy to provide its transitional duty assignments to employees injured on the job whose physicians have prescribed restricted work activities. Whether male or female, pregnant or nonpregnant, all employees who suffer on-the-job injuries are eligible for transitional duty at Continental.[3] (R. 262).

3. Contrary to Petitioner's statement (Petition, at 2, 3, 6) alleging that light duty tasks are "routinely given to other workers" or that at least one employee who was not injured on the job nevertheless received transitional duty, the record evidence is that "[e]ach of the forty-eight employees who received a light-duty assignment in 1994 had suffered an occupational injury." (Petitioner's App., at 4a). While the District Court does note that Petitioner makes an *allegation* that one employee [Peggy Johnson] received transitional duty without an on-the-job injury (Petitioner's App., at 13a), the District Court and the Fifth Circuit did not find evidence to support Petitioner's allegation. The record evidence shows that Continental provided transitional duty to Peggy Johnson, the employee in question, beginning September 22, 1995, for an on-the-job injury described in the Employer's First Report of Injury as "Fell on Uneven Surface, Broke R. Ankle." (R. 536-535, 532-527).

Employees who are unable to perform the full scope of their duties for non-occupational reasons are not eligible for transitional duty. (R. 262). The Company's policies expressly provide: "Employees who are unable to work due to pregnancy are treated the *same* as those with any other non-occupational illness/disability." (R.261-257).

At Continental, Airport Service Agents perform a variety of tasks, including many very physically demanding ones. (R. 256). For example, Ticket Counter Agents like Urbano check-in passengers and lift passengers' luggage weighing up to 70 pounds onto the conveyor belt. (R. 256-255). Urbano does not dispute the fact that the ability to lift at least 70 pounds is an essential function of her job as an Airport Service Agent. (R. 255).

Twice a year, all Airport Service Agents bid for their preferred position and shift. (R. 255). Positions are awarded based on seniority. (R. 255). Urbano bid for and received a position as a Ticket Counter Agent at Houston's Intercontinental Airport, checking-in passengers and lifting their luggage onto the conveyor belt. (R. 255). Almost immediately after Urbano became pregnant, her physician restricted her from lifting more than 20 pounds, making her unable to perform the integral lifting function of her job. (R. 255). She asked if she could work as a Service Center Agent for the duration of her pregnancy. Assistant Director Karen Miles explained that the Service Center positions were filled, both with more senior agents who had bid for them and employees whose physicians' work restrictions (necessitated by on-the-job injuries) made them eligible for the positions through the transitional duty program. (R.255).

Like any other employee unable to perform her duties due to non-occupational reasons, Urbano used her accrued sick pay,

received 90 days of Family/Medical leave and was placed on unpaid Medical leave until she was again able to perform her job. (R. 254). In a usual pregnancy, 90 days of Family/Medical leave is more than sufficient to cover any inability to work during pregnancy as well as to recover from childbirth. However, because she obtained a lifting restriction from her doctor so early in her pregnancy, Urbano's 90 days of Family/Medical leave expired four months before her child was due. Although her Family/Medical leave was exhausted after 90 days, Urbano had approximately five years of additional unpaid Medical leave available under Continental's generous leave policy.

Unfortunately, there was a paperwork error by the Administrative Department, a completely separate department from the department for which Urbano worked. (R.247). When Urbano's Family/Medical leave expired on February 6, 1995, months before her baby was born in June 1995, Urbano appeared on the Administrative Department's list of employees whose leaves, including Family/Medical leaves, had expired and who had failed to return to work or notify the Company of their status. (R. 246). All the employees on the list[4], including Urbano, were sent a form letter administratively terminating their employment, but asking them to call if they had any questions. (R. 246). Instead of calling to rectify the obvious error, (R. 203), or grieving through Continental's internal grievance procedure which provides a multi-level appeal for dispute resolution to a third-party arbitrator if necessary (R. 246-245), Urbano sued.

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4. Contrary to petitioner's statement that this list was "lost" (Petition, at 4, 16), Kimberly Joseph, the pregnant Manager of Administration who took personal responsibility for incorrectly sending out the form termination letter, testified that she simply no longer had the lists which were computer-generated and came out approximately monthly.

As soon as Urbano applied for unemployment benefits, Continental notified the Texas Employment Commission ("TEC") that Urbano had not been terminated, but had been placed on a leave of absence. Contrary to Petitioner's statement (Petition, at 4, 16) that Urbano was never notified of the error or its correction,[5] Urbano testified she did not remember whether or not she learned through the TEC process that Continental had corrected the termination error and changed her employment status to a leave of absence status. (R. 201). In any case, on her attorney's advice Urbano refused to contact Continental to notify Continental of the error. (R. 194A).

As soon as she sued, the Company's answer in this litigation stated that she had not been terminated, and Continental offered unconditional reinstatement if there was any doubt. On the advice of her counsel, Urbano refused and continues to refuse to contact Continental or to return to her former position, even though her physician released her to return to full duty after the birth of her child in June of 1995, over 3 years ago. (R. 215B, 201, 199B, 194A-195). As of Continental's last information, Urbano remains a full-time homemaker and mother.

In addition to the numerous misstatements of fact noted herein, Petitioner's Statement of the Case omits a number of crucial facts. Urbano provided no statistical evidence[6] of any

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5. Contrary to Petitioner's statement that Urbano's inadvertent termination was a "new defense" not asserted to the EEOC (Petition, at 4), Petitioner requested an immediate right-to-sue from the EEOC such that Continental had no opportunity to file a position statement to the EEOC at all. (R. 203).

6. While Petitioner correctly notes (Petition, at 8) that pregnancy would never satisfy the requirement of a physical work restriction caused

(Cont'd)

kind to support her bare claim that Continental's policy produced the sort of class-based imbalance in the workforce necessary for a disparate impact claim. Urbano produced no evidence that the policy was adopted or enforced as a means of intentional pregnancy discrimination. Urbano produced no evidence of a causal connection between the paperwork error by the pregnant Administrative Manager responsible for the form termination letter and Petitioner's protected activity of filing the EEOC charge. Urbano presented no evidence to rebut Continental's summary judgment evidence that, at the time she sent the termination letter, the same pregnant Administrative Manager had no knowledge of Petitioner's EEOC charge, received by Continental Diversity department at another location.[7] Finally, while she complains only now about the lack of a dollar amount of Continental's cost justification for the transitional duty policy, Urbano performed no discovery to determine it. Therefore, in addition to Petitioner's lack of meritorious legal arguments, the Fifth Circuit also correctly

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(Cont'd)
by an occupational injury, the same is true of vacation injuries, non-occupational car wrecks, cancer, etc. Petitioner omits to note that, like any other employee, a pregnant employee is eligible to receive transitional duty if she is injured on the job while pregnant.

7. The administrative-termination form letter is dated March 21, 1995. The Director of Diversity received Urbano's EEOC charge at Continental's downtown headquarters on March 21, 1995. (R. 129-123). The Diversity department mailed it from the downtown headquarters location to the Intercontinental Airport location to Urbano's operational department by memorandum dated March 22, 1995. (R. 129-123). The operational department Urbano claims discriminated against her on the basis of her pregnancy did not receive the charge of discrimination until after the termination letter had been sent. The Administrative Department that decided to send and sent the termination letter did not receive notice of Urbano's charge of discrimination until the discovery period of this lawsuit. (R. 247-245).

affirmed summary judgment in Continental's favor for her lack of evidence to support her claims.

SUMMARY OF THE ARGUMENT THE PETITION SHOULD BE DENIED

Petitioner suggests that this Court should grant *certiorari* in this case for the purpose of announcing a bright-line test that pregnant employees must receive preferential treatment[8] in light duty programs over others with non-occupational work restrictions[9]. Such a rule would go beyond the requirements of equal treatment which are the foundation of Title VII and the PDA and would not comport with this Court's classic Title VII analysis, or its decisions in *Newport News Shipbuilding and Dry Dock Co., v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622 , 77 L. Ed. 2d 89 (1983); *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). Because the purpose of the PDA was to return the law to pre-*Gilbert* Title

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8. Petition at 10 ("In other words it does not offend Title VII for pregnant women to be treated equally with the highest category of workers and therefore, better than *some* employees — as long as pregnant women are not treated better than *all* employees."). This is the point at which the Fifth Circuit noted the argument that such preferential treatment of pregnant workers discriminates against men who, solely because of their sex, could never be eligible such a pregnancy exception. (Petitioner's App., at 8a, n.2).

9. The only rationale for accepting *certiorari* would be to overturn the poorly-reasoned opinion in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) requiring preferential treatment of pregnant workers, in favor of the better-reasoned, equal-treatment opinions of the Fifth Circuit herein and the Fourth Circuit in *White v. Frank*, 1993 U.S. App. LEXIS 27066 (4th Cir. 1993) (*See* 5th Circuit Brief of Appellee at Appendix A-1).

VII analysis, such a bright-line test would also constitute inappropriate judicial legislation, quashing these win-win policies benefiting employees injured on the job, and creating new rights and privileges for a special few at the expense of the remainder. The Fifth Circuit correctly affirmed summary judgment in favor of Continental both because of its meritorious legal points and because Petitioner failed to meet her burden under *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), to produce evidence of a necessary fact issue to avoid summary judgment. Petitioner's remaining points are unworthy of this Court's attention because they are mere semantic arguments attempting to create a split in the Circuits where none exists and to try to obtain another level of evidentiary review.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ARGUMENT TO TAKE THE PDA OUT OF ITS TITLE VII CONTEXT NOT GROUNDS FOR CERTIORARI.

Although Petitioner accuses the Fifth Circuit of "light" legal analysis, Petitioner's complaint seems to be that the Fifth Circuit analyzes Urbano's claim of intentional pregnancy discrimination in accordance with classic Title VII principles.

> To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified

for the position lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. *See Geier v. Medtronic*, 99 F.3d 238, 241 (7th Cir. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824). Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [her sex]." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993) (internal citation omitted).

The district court found that Urbano failed to establish the second prong of her prima facie case for disparate treatment. Specifically, the district court held that Urbano could not provide evidence creating a genuine fact issue as to whether she was qualified for transfer into a light-duty position, i.e., that she sustained a work related injury. Continental also asserts that Urbano failed to offer evidence that she was treated differently under Continental's policy than other employees with nonoccupational injuries.

We agree.

Continental treated Urbano in exactly the same manner as it would have treated any other worker who was injured off the job. Light duty assignments were at a premium. Each of the forty-eight employees who received a light duty assignment in

> 1994 had suffered an occupational injury. Urbano was not denied a light-duty position because of her pregnancy, but because her back troubles were not work related.
>
> . . .
>
> There is no probative evidence that Continental's distinction between occupational and off-the-job injuries was a pretext for discrimination against pregnant women or that it had a disparate impact on them. Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA. As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light duty policy as employees with occupational injuries.

(Petitioner's App., at 4a, 7a-8a.). Because the Fifth Circuit did no more than follow this Court's time-tested, *McDonnell Douglas* burden-shifting Title VII analysis, this case is not deserving of *certiorari*.

In fact, by referring to this Court's decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), Petitioner impliedly admits that the *McDonnell Douglas* burden-shifting analysis normal to Title VII cases applies to an analysis of a pregnancy discrimination case. (Petition, at 15). Yet, Petitioner seeks *certiorari* for the proposition that two of the four prongs of the *McDonnell Douglas prima facie* case do not apply to pregnancy claims, *i.e.*, Urbano need not show that she is qualified for the position

she seeks by demonstrating that her lifting restriction is caused by an on-the-job injury and Urbano need not demonstrate that she is similarly-situated to those who receive transitional duty (injured on the job) so long as she shows she is temporarily disabled. In further avoidance of the hallmark Title VII analysis, Petitioner seeks *certiorari* for the proposition that Continental must do more than articulate its legitimate, nondiscriminatory business reason for the policy[10]. Finally, Petitioner asserts she need not offer evidence that the policy in favor of those injured on the job is a pretext, or cover-up for intentional pregnancy discrimination, the *sine qua non* of a discrimination case.[11]

This Court has long recognized that "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 218, 111 S. Ct. 1196, 1213, 113 L. Ed. 2d 158 (1991) (White, J., concurring in part and concurring in the judgment), *citing, Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1085, n.14, 103 S. Ct. 3492, 3499-3500, n.14, 77 L. Ed. 2d 1236 (1983). While the PDA redefines sex discrimination to include pregnancy and related

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10. Petitioner considers Continental's first reason, that it feels a special obligation to those injured in the line of duty, well-intentioned but irrelevant and invalid. (Petition at 14). Petitioner considers Continental's second reason, the cost savings associated with reduced workers compensation payments and workers compensation supplements arising from an earlier return to work, insufficient "because Continental never offered any evidence of exactly what its costs were. . . ." (Petition at 14).

11. Petition, at 16-17. (Claiming jurors should be permitted to disbelieve that Continental's policy simply favors those injured on the job).

conditions, "it does not change the application of Title VII to sex discrimination in any other way." *Johnson Controls*, 499 U.S. at 219, 111 S. Ct. at 1214 (White, J., concurring in part and concurring in the judgment), *citing*, Senate Report No. 95-331, pp. 3-4 (1977). This Court has analyzed a policy attacked under the PDA by virtue of a "simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Johnson Controls*, 499 U.S. at 200, 111 S. Ct. at 1204, *citing*, *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S. Ct. 1370, 1377, 55 L. Ed. 2d 657 (1978). Continental's transitional duty policy easily passes this test, as well as analysis under classic Title VII principles, because had Urbano not been pregnant or even had she been male, she still would not have been eligible for the program because she was not injured on the job. "To establish discrimination, [plaintiff] was required to show that she was treated differently than other employees because of her pregnancy." *Tuohey v. Chicago Park District*, 148 F.3d 735, 740 (7th Cir. 1998). Under Title VII, the critical issue is whether members of one sex are exposed to disadvantageous terms or conditions to which members of the other sex are not exposed. *Oncale v. Sundowner Offshore Servs., Inc.*, __ U.S. __, __, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998). Urbano cannot show differential treatment based on her pregnancy.

The petition for a writ of *certiorari* should be denied because Petitioner's position is no more than a frontal assault on well-established Title VII principles in an attempt to provoke judicial legislation in favor of preferential treatment of pregnant workers at the expense of their coworkers.

II.

THE DECISIONS OF THE DISTRICT COURT AND FIFTH CIRCUIT ARE CONSISTENT WITH THIS COURT'S DECISIONS IN *NEWPORT NEWS* AND *GUERRA*.

In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 685, 103 S. Ct. 2622, 2632, 77 L. Ed. 2d 89 (1983), this Court held that a limitation in an employer's health insurance plan, which provided female employees with benefits for pregnancy-related conditions to the same extent as for other medical conditions but which provided less extensive pregnancy benefits for spouses of male employees, discriminated against male employees in violation of Title VII, as amended by the PDA. While the case at bar concerns Continental's transitional duty program rather than disability insurance or any other fringe benefit, *Newport News* provides crucial and careful analysis of the legislative history of the PDA. Both the majority[12] and the dissent[13] in *Newport News* agree that Congress' purpose and

12. *Newport News*, 462 U.S. at 670, 103 S. Ct. at 2624 (Congress "overruled" Gilbert by amending Title VII with the PDA); 462 U.S. at 678, 103 S. Ct. at 2628 ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."); 462 U.S. at 679, 103 S. Ct. at 2628-29 (purpose of PDA to reestablish Title VII principles as they had been understood prior to *Gilbert*) 462 U.S. at 679, 103 S. Ct. at 2629, n.17 (collecting legislative history regarding Congress' purpose simply to provide corrective legislation to restore law to pre-*Gilbert* status).

13. *Newport News*, 462 U.S. at 686, 103 S. Ct. at 2632-33 ("... there is no question but what the Pregnancy Discrimination Act manifests Congressional dissatisfaction with the result we reached in *Gilbert*."); 462 U.S. at 690, 103 S. Ct. at 2634-35 (Congressional Record on PDA overflowing with Congress' intention to assure equal treatment); 462 U.S. at 690 n.5, 103 S. Ct. at 2634-35 n.5 (footnote collecting legislative history regarding Congress' intention in enacting PDA to assure equal treatment).

result in enacting the PDA was to reestablish toward pregnancy the equal-treatment principles of Title VII law as they had been understood prior to the *Gilbert*[14] decision.

This Court has also held that Title VII did not preempt a California statute providing limited preferential treatment toward pregnant women in the form of qualified reinstatement. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 292, 107 S. Ct. 683, 695, 93 L. Ed. 2d 613 (1987). Although *Guerra* is a highly-fractured decision on the question of whether the equal-treatment principles of Title VII preempt the preferential treatment required by the California statute, again both the majority[15] and the dissent[16] agree at least that Title VII does not *require* preferential treatment toward pregnant employees, with the dissent steadfastly maintaining that the equal-treatment language of the PDA does not permit preferential treatment.

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14. *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976).

15. *Guerra*, 479 U.S. at 286, 107 S. Ct. at 692 ("... the legislative history [of the PDA] is devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment."); 479 U.S. at 288, 107 S. Ct. at 692 ("On the contrary, if Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not *require* such conduct. It is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment.").

16. *Guerra*, 479 U.S. at 303-304, 107 S. Ct. at 701 (legislative history specifically indicated the PDA does not mandate benefits or other preferential treatment for pregnant employees).

The Fifth Circuit and other Circuits have followed this Court's decisions that the PDA does not mandate preferential treatment. *Garcia v. Women's Hospital of Texas*, 97 F.3d 810, 813 (5th Cir. 1996); *see also Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994). ("The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy."); *Armstrong v. Flowers Hospital, Inc.*, 33 F.3d 1308, 1316 (11th Cir. 1994) (a claim that an employer must make alternative work available for pregnant employees "is more accurately viewed as an effort to secure preferential treatment for pregnant employees."). Because Continental declines to provide preferential treatment to pregnant employees (as specifically allowed by *Guerra)* in its workers compensation "transitional duty" program, but does treat pregnant employees equally with other employees not receiving workers compensation benefits in accordance with the principles announced in *Newport News*, *certiorari* would not be appropriate in this case.

III.

THE DECISIONS OF THE DISTRICT COURT AND FIFTH CIRCUIT ARE CONSISTENT WITH THIS COURT'S DECISIONS IN *FEENEY.*

In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 275, 99 S. Ct. 2282, 2294, 60 L. Ed. 2d 870 (1979), this Court carefully noted that policies in favor of a deserving, non-protected class of employees or applicants (veterans) are not violative of equal protection principles. The veterans' preference statute did not deprive women of equal protection of the laws because the statute was a preference for

veterans of either sex over nonveterans of either sex, not for men over women. *Feeney*, 442 U.S. at 279, 99 S. Ct. at 2296-97. Similarly, Continental's workers compensation program provides transitional duty to those, male or female, pregnant or nonpregnant, who are injured on the job. Veterans preferences are both common and justified on the basis of rewarding veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations. *Feeney*, 442 U.S. at 265, 99 S. Ct. at 2289. Similarly, Continental's transitional duty program rewards the sacrifices of those injured on the job and eases their transition from workers compensation benefits to normal, unrestricted duty.

Rewarding the sacrifices of those injured on the job, like the rationale for veterans preferences, is a legitimate and worthy purpose, not created as a pretext for pregnancy discrimination. *See Feeney*, 442 U.S. at 274-75, 99 S. Ct. at 2294. Moreover, in the same way that a significant number of male nonveterans are affected by a veterans preference, a significant number of nonpregnant employees[17] are affected by the transitional duty program's limitation to those injured on the job. *See Feeney*, 442 U.S. at 275, 99 S. Ct. 2294 ("Too many men are affected

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17. Although not violative of equal protection privileges, veterans preferences severely impact women. *See Feeney*, 442 U.S. at 270, 99 S. Ct. at 2292. However, because pregnant and nonpregnant employees are at best equally disadvantaged by the injured-on-the-job limitation of Continental's transitional duty program, Urbano has not and cannot produce a single statistic suggesting the limitation falls more harshly on pregnant employees than nonpregnant employees. In fact, nonpregnant employees with long-term illnesses or injuries incurred off the job, such as cancer or severe car wreck victims, would seem to be more disadvantaged simply because of the relatively short disability period of a normal pregnancy.

by [the veteran's preference statute] to permit the inference that the statute is but a pretext for preferring men over women."). The *Feeney* Court stated: ". . . the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women." *Feeney*, 442 U.S. at 279, 99 S. Ct. 2296-97. Similarly, Continental's workers compensation program remains what it purports to be, a valuable program for those injured on-the-job of either sex, not a program for the nonpregnant over the pregnant. Because Continental's workers' compensation program comports with *Feeney, certiorari* would not be appropriate in this case.

IV.

PETITIONER'S REQUEST IS NOTHING MORE THAN SEMANTICS AND A REQUEST FOR A REVIEW OF THE EVIDENTIARY FINDINGS WHICH WERE EXPRESSLY AFFIRMED BY THE COURT OF APPEALS AND WHICH ARE UNWORTHY OF REVIEW BY THIS COURT.

Petitioner has two additional claims that there is a split in the Circuits. However, the alleged distinctions are mere semantics which do not rise to the level of a conflict at all. First, Petitioner tries to "create" a split in the Circuits on the necessary level of proof for evidence of pretext under *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), seeking *certiorari* for alleged distinctions between "evidence" and "distinct evidence". (Petition, at 17). Next, Petitioner tries to create a split in the Circuits on the necessary level of proof for evidence of retaliation based on timing alone, apparently seeking *certiorari* on whether the inference should be rebuttable. (Petition, at 18-19). More egregiously, and with a notable lack of citation to the District Court's opinion in her own appendix, Urbano incorrectly states

(Petition, at 19): "The district court's explanation of the Fifth Circuit rule that close timing is *never* sufficient provides a great blow to the adequate enforcement of Title VII." (Emphasis in original). A correct statement and a direct quote of the district court's holding is: "The timing of the adverse employment action may be a significant, but not necessarily determinative factor." (Petitioner's App., at 14a). In the face of record evidence that the pregnant decisionmaker did not know of Petitioner's protected activity, (R. 129-123, 247-245), and Petitioner's admission that timing alone was her only claim to a retaliation cause of action (R. 200, 194-194A), Petitioner's request for *certiorari* on this alleged issue comes perilously close to failing to be candid with this Court. These are more attempts, like misstatement and omissions of the record evidence, to get another bite at the apple of evidentiary review. The Fifth Circuit not only correctly affirmed summary judgment on these matters, they do not raise any significant issue of law worthy of this Court's attention.

CONCLUSION

Because the Fifth Circuit and the District Court acted in accordance with this Court's equal-treatment jurisprudence under Title VII and the PDA and because Urbano has simply failed to put forward probative evidence in support of any of her claims, this case is not appropriate for *certiorari*.

Respectfully submitted,

ROBIN E. CURTIS
Counsel of Record
MARGARET COULLARD PHILLIPS
CONTINENTAL AIRLINES, INC.
Attorneys for Respondent
2929 Allen Parkway
Suite 1466
Houston, Texas 77019
(713) 834-5119